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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MARK EDWARD PAULSON, Defendant and Appellant.	E047209 (Super.Ct.Nos. SWF025071, SWF025931) **OPINION**

APPEAL from the Superior Court of Riverside County. Roger A. Luebs, Judge. Affirmed.

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Steve Oetting and Eric A. Swenson, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, defendant Mark Edward Paulson was found guilty of committing a theft after having been previously convicted of a theft-related crime (Pen. Code, §§ 484, subd. (a)/666)[1] (count 3).[2] In a bifurcated proceeding, defendant admitted that he had sustained five prior strike convictions (§§ 667, subds. (c) & (e), 1170.12, subd. (c)(2)(A)) and five prior prison terms (§ 667.5, subd. (b)). As a result, defendant was sentenced to a total term of 30 years to life in state prison. On appeal, defendant contends (1) his sentence constitutes cruel and unusual punishment; (2) the trial court abused its discretion in denying his motion to strike his prior strike convictions; and (3) the manner in which the three strikes law was applied in his case violates the state and federal equal protection guarantees. We reject these contentions and affirm the judgment.

I

FACTUAL BACKGROUND[3]

On October 13, 2007, about 4:30 p.m., defendant entered a Stater Bros. Market in Perris and filled a shopping cart with $290.49 worth of groceries and liquor. Defendant then pushed the shopping cart out the front doors of the market without paying for any of the items. Defendant was apprehended by Stater Bros. security as he tried to flee.

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[1] All future statutory references are to the Penal Code unless otherwise stated.

[2] The jury found defendant not guilty of the two sex-registration offenses (§ 290) charged in counts 1 and 2.

[3] The factual background is limited to the offense of which defendant was found guilty.

II

DISCUSSION

A. *Cruel and Unusual Punishment*

Defendant contends that imposition of an indeterminate life term for a nonviolent petty theft offense violates federal and state constitutional provisions against cruel and unusual punishment. Assuming, without deciding, that defendant preserved this issue for review, we disagree.

Under the state constitutional standard, "'"[t]o determine whether a sentence is cruel or unusual as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including age, prior criminality, and mental capabilities. [Citation.] If the court concludes that the penalty imposed is 'grossly disproportionate to the defendant's individual culpability' [citation], or, stated another way, that the punishment '"'shocks the conscience and offends fundamental notions of human dignity'"' [citation], the court must invalidate the sentence as unconstitutional." [Citation.]' [Citation.]" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1099.)

"'Our Supreme Court has emphasized "the considerable burden a defendant must overcome in challenging a penalty as cruel or unusual. The doctrine of separation of powers is firmly entrenched in the law of California, and a court should not lightly

encroach on matters which are uniquely in the domain of the Legislature. Perhaps foremost among these are the definition of crime and the determination of punishment. While these intrinsically legislative functions are circumscribed by the constitutional limits of article I, section 17 [of the California Constitution], the validity of enactments will not be questioned 'unless their unconstitutionality clearly, positively, and unmistakably appears.'" [Citation.]' [Citation.]" (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 569.)

"'Whether a punishment is cruel or unusual is a question of law for the appellate court, but the underlying disputed facts must be viewed in the light most favorable to the judgment.' [Citation.]" (*People v. Em* (2009) 171 Cal.App.4th 964, 971.)

"In examining whether a sentence is cruel and unusual under California law, this court: (1) examines the 'nature of the offense and/or the offender, with particular regard to the degree of danger both present to society' [citation]; (2) compares the challenged punishment with punishments prescribed for more serious offenses in the same jurisdiction; and (3) compares the challenged punishment with punishments prescribed for the same offense in other jurisdictions [citation]." (*People v. Cline* (1998) 60 Cal.App.4th 1327, 1337 (*Cline*).) As mentioned previously, "[d]efendant must overcome a 'considerable burden' to show the sentence is disproportionate to his level of culpability. [Citation.] Therefore, '[f]indings of disproportionality have occurred with exquisite rarity in the case law.' [Citation.]" (*People v. Em, supra,* 171 Cal.App.4th at p. 972.)

It is permissible to base the determination of whether punishment is cruel and unusual solely on the offense and the offender. (*People v. Ayon* (1996) 46 Cal.App.4th 385, 399, disapproved on other grounds in *People v. Deloza* (1998) 18 Cal.4th 585, 600, fn. 10; see, e.g., *People v. Young* (1992) 11 Cal.App.4th 1299, 1308-1311; *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1198-1200.)

Defendant essentially argues his sentence is cruel or unusual under the California Constitution because his current crime was nonviolent. Defendant's claim that his three-strikes punishment is disproportionate to the circumstances of the offenses and the offender is without merit. Although defendant characterizes his offenses as nonviolent, his sentence was not calculated merely on the basis of his current offenses, but on the basis of his recidivist behavior. (*Cline*, *supra*, 60 Cal.App.4th at p. 1338.)

Here, the characteristic of both the offense and the offender is recidivism. Defendant has a lengthy criminal history. This is defendant's 16th criminal matter. He began the life of crime in 1972 as a juvenile and has five prior violent and serious felony convictions, for armed robbery, robbery, and sexual penetration by a foreign object. He also has numerous other convictions for which he has been on probation and parole. Moreover, his current offense was committed while he was still on probation and parole. A sentence of 30 years to life (25 years to life for the current offense, plus five years for the prior prison terms) based on such recidivism is not unconstitutional. (*People v. Stone* (1999) 75 Cal.App.4th 707, 715; accord, *People v. Martinez* (1999) 71 Cal.App.4th 1502,

1512; *Cline, supra,* 60 Cal.App.4th at pp. 1337-1338.) This is true even where the present offenses are technically nonviolent. (*Cline,* at pp. 1337-1338.)

What defendant considers mitigating factors do not warrant leniency in this case. Defendant's lengthy criminal record, including his parole and probation violations, reveals he is a recidivist who has resisted prior efforts at rehabilitation. Although no one was injured during defendant's most recent offense, he created a dangerous situation in trying to flee the market's security guard. "In any event, society's interest in deterring criminal conduct or punishing criminals is not always determined by the presence or absence of violence. [Citations.]" (*People v. Cooper* (1996) 43 Cal.App.4th 815, 826.) Finally, "drug addiction is not necessarily regarded as a mitigating factor when a criminal defendant has a long-term problem and seems unwilling to pursue treatment." (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1511.) "[Defendant] . . . was before the trial court as a career criminal who had preyed on society and failed to benefit from multiple incarcerations and periods of parole . . . ." (*People v. Ayon*, *supra,* 46 Cal.App.4th at p. 400.) A sentence of 30 years to life was not disproportionate to this particular offense and offender.

Where the punishment is proportionate to the defendant's personal culpability, there is no requirement that it be proportionate to other similar cases. (*People v. Webb* (1993) 6 Cal.4th 494, 536.) Because intercase proportionality is not required to avoid the infliction of cruel or unusual punishment (*People v. Crittenden* (1994) 9 Cal.4th 83, 156),

we address the second and third prongs in *People v. Lynch* (1972) 8 Cal.3d 410 only briefly.

As to the relative punishment for offenses in California, defendant's sentence is not unlike others imposed under the three strikes law that have repeatedly been upheld by the courts. (See, e.g., *People v. Romero* (2002) 99 Cal.App.4th 1418, 1431-1433 [sentence of 25 years to life imposed for third strike of felony petty theft]; *People v. Goodwin* (1997) 59 Cal.App.4th 1084, 1093-1094 [sentence of 25 years to life imposed for third strike of petty theft with a prior conviction].) "[P]roportionality assumes a basis for comparison. When the fundamental nature of the offense and the offender differ, comparison for proportionality is not possible. The seriousness of the threat a particular offense poses to society is not solely dependent on whether it involves physical injury. Consequently, the commission of a single act of murder, while heinous and severely punished, cannot be compared with the commission of multiple felonies. [Citation.]" (*People v. Cooper*, *supra*, 43 Cal.App.4th 815, 826; accord, *People v. Gray* (1998) 66 Cal.App.4th 973, 993; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1137.)

Finally, regarding relative punishment in other jurisdictions, California's three strikes sentencing scheme "is consistent with the nationwide pattern of substantially increasing sentences for habitual offenders." (*People v. Ingram* (1995) 40 Cal.App.4th 1397, 1416, disapproved on another ground in *People v. Dotson* (1997) 16 Cal.4th 547, 559-560 & fn. 8; accord, *People v. Ruiz* (1996) 44 Cal.App.4th 1653, 1665; *Cline*, *supra*, Cal.App.4th at p. 1338.)

The penalty imposed here is not so substantially harsher than that imposed in other states as to call its validity into question. That some other jurisdictions may impose shorter terms for recidivists like defendant does not render his sentence disproportionate to his criminal status. "[T]he needs and concerns of a particular state may induce it to treat certain crimes or particular repeat offenders more severely than any other state. Nothing in the prohibition against cruel or unusual punishment per se disables a state from responding to changed social conditions and increasing the severity with which it treats its recidivist felons." (*People v. Cooper*, *supra*, 43 Cal.App.4th at p. 827.)

The fact "[t]hat California's punishment scheme is among the most extreme does not compel the conclusion that it is unconstitutionally cruel or unusual. This state constitutional consideration does not require California to march in lockstep with other states in fashioning a penal code. It does not require 'conforming our Penal Code to the "majority rule" or the least common denominator of penalties nationwide.' [Citation.] Otherwise, California could never take the toughest stance against repeat offenders or any other type of criminal conduct." (*People v. Martinez*, *supra*, 71 Cal.App.4th at p. 1516.)

Defendant also argues his sentence violates the federal prohibition against cruel and unusual punishment, discussing the same three-part analysis applicable under the California Constitution. We would not reach a different result under the federal Constitution. The hurdles defendant must surmount to demonstrate cruel and unusual punishment under the federal Constitution are, if anything, higher than under the state Constitution. (See generally *People v. Cooper*, *supra*, 43 Cal.App.4th at pp. 819-825.)

"The Eighth Amendment [to the United States Constitution], which forbids cruel and unusual punishments, contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'" (*Ewing v. California* (2003) 538 U.S. 11, 20 [123 S.Ct. 1179, 155 L.Ed.2d 108, 117].) This principle is "applicable only in the 'exceedingly rare' and 'extreme' case." (*Lockyer v. Andrade* (2003) 538 U.S. 63, 73 [123 S.Ct. 1166, 155 L.Ed.2d 144].)

"[T]he principles developed by our court [regarding cruel or unusual punishment] are similar to those developed by the United States Supreme Court. [Citation.] . . . [T]he federal high court's reminder that appellate courts, 'of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes[.]' [Citation.]" (*People v. Barrera* (1993) 14 Cal.App.4th 1555, 1566, fn. 7.) "In weighing the gravity of [defendant's] offense, we must place on the scales not only his current felony, but also his long history of felony recidivism. Any other approach would fail to accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions." (*Ewing v. California, supra,* 538 U.S. at p. 29 [sentence of 25 years to life imposed on a third-strike offender who stole three golf clubs does not violate the Eighth Amendment's prohibition against cruel and unusual punishment]; see also *Lockyer v. Andrade, supra,* 538 U.S. 63 [two consecutive sentences of 25 years to life imposed on a third-strike offender who stole about $150 worth of videotapes in two separate incidents not cruel and unusual punishment]; *Rummel v. Estelle* (1980) 445 U.S. 263, 268-286 [100

S.Ct. 1133, 63 L.Ed.2d 382] [the Supreme Court upheld a sentence under a Texas recidivist statute of life with the possibility of parole for obtaining $120.75 by false pretenses, even where the defendant's previous offenses consisted of fraudulent use of a credit card to obtain goods and services worth $80 and passing a forged check in the amount of $28.36].) A fortiori, defendant's sentence is permissible under these circumstances.

B. *Motion to Strike Priors*

Defendant argues the trial court abused its discretion by refusing to strike his prior serious and violent felony convictions pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497. We disagree.

A trial court's decision to not dismiss or strike a prior serious and/or violent felony conviction allegation under section 1385 is reviewed for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376.) "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, '"[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review."' [Citation.] Second, a '"decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'"' [Citation.] Taken together, these precepts establish that a

trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at pp. 376-377, quoting *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978, quoting *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831 and *People v. Preyer* (1985) 164 Cal.App.3d 568, 573; see also *People v. Myers* (1999) 69 Cal.App.4th 305, 309.)

The California Supreme Court explained, "In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not 'aware of its discretion' to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation]." (*People v. Carmony, supra,* 33 Cal.4th at p. 378, citing *People v. Langevin* (1984) 155 Cal.App.3d 520, 524 and *People v. Gillispie* (1997) 60 Cal.App.4th 429, 434.) Discretion is also abused when the trial court's decision to strike or not to strike a prior is not in conformity with the "spirit" of the law. (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*); *People v. Myers, supra,* 69 Cal.App.4th at p. 310.)

But "[i]t is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance. [Citation.]" (*People v. Myers, supra,* 69 Cal.App.4th at p. 310.) "Because the circumstances must be 'extraordinary . . . by

which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*People v. Carmony*, *supra*, 33 Cal.4th at p. 378, quoting *People v. Strong* (2001) 87 Cal.App.4th 328, 338.)

The touchstone of the analysis must be "whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Williams*, *supra*, 17 Cal.4th 148, 161; see also *People v. Garcia* (1999) 20 Cal.4th 490, 498-499.) A decision to dismiss a strike allegation based on its remoteness in time is an abuse of discretion where the defendant has not led a life free of crime since the time of his conviction. (*People v. Humphrey* (1997) 58 Cal.App.4th 809, 813.)

Defendant contends the court should have granted his request to strike his prior strike convictions given that his current crime would "ordinarily constitute a misdemeanor, but for the prior conviction of robbery, which was also alleged as a strike[]." We cannot conclude the trial court abused its discretion in declining to strike one or all of defendant's prior strike convictions. The relevant considerations supported

the trial court's ruling, and there is nothing in the record to show that the court declined to exercise its discretion on improper reasons or that it failed to consider and balance the relevant factors, including defendant's personal and criminal background. In fact, the record clearly shows the court was aware of its discretion, aware of the applicable factors a court must consider in dismissing a prior strike, and appropriately applied the factors as outlined in *Williams*.

This case is far from extraordinary. Defendant has manifested a persistent inability to conform his conduct to the requirements of the law. Though defendant's current crime can be characterized as nonviolent, defendant does have a violent and serious prior record of criminal behavior beginning in 1972. Defendant has five prior serious and violent felony convictions, as noted previously; five prior prison terms; and numerous other convictions due to his violent tendencies. Defendant's convictions include offenses for grand theft, felony driving while under the influence of alcohol, robbery, receiving stolen property, sexual penetration with a foreign object, escape from prison, throwing an object at another vehicle with an intent to do great bodily harm, being a felon in possession of a firearm, and resisting arrest by threatening to use a deadly weapon against police officers. As defendant's criminal record indicates, since 1972, defendant has been in and out of prison, having committed numerous felony and misdemeanor offenses and having repeatedly violated probation and parole. In fact, defendant's criminal record shows that he has spent most of the last 30 years in the

criminal justice system and continued to commit crimes and violate his parole and probation.

The court here could not overlook the fact defendant continued to commit serious criminal offenses and violate the terms and conditions of his probation and parole even after repeatedly serving time in prison. His conduct as a whole was a strong indication of unwillingness or inability to comply with the law. He has shown his continual disregard for the law as evidenced by his continual parole and probation violations and criminal convictions. It is clear from the record that prior rehabilitative efforts have been unsuccessful for defendant. Indeed, defendant's prospects for the future look no better than the past, in light of defendant's record of prior offense and reoffense and substance abuse. All of these factors were relevant to the trial court's decision under *Romero*; there is no indication from the record here that the court failed to consider the relevant factors or that it failed to properly balance the relevant factors or that it abused its discretion in determining that, as a flagrant recidivist, defendant was not outside the spirit of the three strikes law. (*Williams*, *supra*, 17 Cal.4th at p. 161.)

Indeed, defendant appears to be "an exemplar of the 'revolving door' career criminal to whom the Three Strikes law is addressed." (*People v. Stone* (1999) 75 Cal.App.4th 707, 717.) Thus, given defendant's continuous criminal history, his numerous parole and probation violations, the seriousness of the past offenses, and his seemingly dim prospects for rehabilitation and lack of meaningful crime-free periods, we cannot say that the trial court abused its discretion when it declined to dismiss one or

more of defendant's prior strike convictions. The trial court's decision not to strike defendant's priors was neither irrational nor arbitrary.

In short, defendant was within the spirit of the three strikes law (see *Williams*, *supra*, 17 Cal.4th at p. 161), the trial court did not rule in an "arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice" (see *People v. Jordan* (1986) 42 Cal.3d 308, 316), and we find no abuse of discretion (see *Romero*, *supra*, 13 Cal.4th at p. 504).

C. *Equal Protection*

Defendant also complains that his sentence was a denial of equal protection because he was treated differently from similarly situated petty theft offenders who have committed other prior serious felonies. Defendant argues that, because his prior serious felonies were theft offenses, the law arbitrarily singles him out to receive a stricter penalty. In other words, defendant claims the three strikes law violates the equal protection clauses of the federal and state Constitutions as applied to him because it authorizes a life sentence for a petty thief such as himself, who has prior theft-related strike convictions, but not for a petty thief whose strike convictions are not theft-related. His argument fails on several grounds.

First, courts have repeatedly upheld the three strikes law against equal protection challenges. (See, e.g., *People v. Edwards* (2002) 97 Cal.App.4th 161, 164-165; *People v. Cressy* (1996) 47 Cal.App.4th 981, 993; *People v. Hamilton* (1995) 40 Cal.App.4th 1615, 1619-1620; *People v. Sipe* (1995) 36 Cal.App.4th 468, 483-484.) Moreover, as defendant

recognizes, his similar equal protection argument was rejected in *People v. Nguyen* (1997) 54 Cal.App.4th 705. There, the court held that "[t]he commission of theft by a thrice convicted individual with not only a history of serious felony misconduct but also of committing theft and being confined therefore poses a much more serious danger to the community than the commission of theft by [a] twice convicted individual with a history of serious felony misconduct who has never before committed theft." (*Id*. at p. 718.) Defendant disagrees with *Nguyen*, but, in the more than seven years since *Nguyen* was decided, no court to our knowledge has questioned its conclusion on the equal protection issue.

In addition, *Nguyen's* conclusion that a repeat thief is more of a threat to society than a recidivist who is not a repeat thief is inherently supported by Penal Code section 666. The statute recognizes that repeat thieves are more dangerous by permitting them to be punished as felons for what would otherwise be a misdemeanor. The fact that the statute authorizes greater punishment for a thief who has been imprisoned for a prior theft-related conviction than for other thieves does not violate equal protection. (*People v. Beaty* (1978) 84 Cal.App.3d 239, 243.)

Courts have consistently held there is no equal protection violation in the fact that the three strikes law authorizes more severe punishment for an offender with strike priors whose current offense is not serious or violent than for one who commits the same crimes in the reverse order. (*People v. Kilborn* (1996) 41 Cal.App.4th 1325, 1331; *People v. Cooper*, *supra*, 43 Cal.App.4th at pp. 828-830.) By parity of reasoning, it is not a

violation of equal protection to impose a three-strikes sentence on defendant merely because his current theft-related offense was not serious or violent.

In all, defendant had not one, but four, prior theft-related convictions, three of which were serious felonies. (§ 1192.7, subd. (c)(18), (19).) He showed a consistent willingness to steal other people's property and showed no signs of having undergone a change in his character. He was more of a danger to society than a petty thief without any theft-related priors, and his three strikes sentence did not violate equal protection.

III

DISPOSITION

The judgment is affirmed.

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RICHLI
Acting P.J.

We concur:

GAUT
J.

MILLER
J.